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Expo Holdings Sdn Bhd & Ors v Toyo Ink Group Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC-14–01 OF 2013
MARY LIM J
2 AUGUST 2013

Companies and Corporations — Memorandum and articles of association — Alteration of articles — Right to alter or amend company's memorandum and articles of association ('M&A') — Amendment of M&A to reflect rights issue, bonus issue and increase in authorised share capital — Whether alteration properly and validly carried out — Exercise to raise capital for company's benefit — Alteration in best interest of company — Whether approval from members obtained — Whether proper professional advise obtained — Whether legal requirements of Bursa complied with — Whether plaintiff's rights as shareholders infringed — Whether amendment valid and proper

Companies and Corporations — Shares — Issue of shares — Whether rights issue and bonus issue of shares properly and validly carried out — Authority to capitalise sums in reserves and premium account — Whether necessary approval from members obtained — Whether proper professional advise obtained — Whether legal requirements of Bursa complied with — Companies Act 1965 s 60(3)

Three ordinary resolutions and one special resolution were passed at the extraordinary general meeting of the defendant. These resolutions were occasioned by a corporate exercise undertaken by the defendant. Resolution 1 was for the issuance of renounceable rights issue of new ordinary shares; resolution 2 was for the issuance of bonus issue on the basis of one new share for every two rights share subscribed by the existing shareholders; resolution 3 was for the increase of the authorised share capital of the defendant; and resolution 4 was for the amendment to the defendant's memorandum and articles of association ('M&A') as a consequence of the proposed rights issue, proposed bonus issue and proposed increase in the authorised share capital. The plaintiffs were minority shareholders of the defendant. The plaintiffs challenged resolution 2 and resolution 4 claiming that these resolutions were null and void and were ultra vires the defendant's M&A. The plaintiffs contended that the original article 130 of the defendant's M&A did not allow the corporate exercise envisaged under resolution 2 to be carried out. The plaintiffs further claimed that the resolutions created two different classes of ordinary shareholders by giving bonus shares to only a particular group of ordinary shareholders, ie the group of shareholders who subscribe to the rights issues.

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The defendant argued that the commercial rationale behind the whole corporate exercise was to raise working capital for the defendant. The proceeds from the subscription were further expected to reduce or pare down the defendant's bank borrowings. This was said to be in the bona fides interests of the defendant.

Held, dismissing the plaintiffs' claim with costs of RM80,000:

(1) In relation to the authority to capitalise sums in the reserves and premium account, the board of directors of the defendant was vested with the necessary powers to make such recommendations to the EGM. The defendant, as a company listed on the main board of Bursa Malaysia Securities Bhd (Bursa) was also obliged to comply with the stringent legal requirements of Bursa before affecting such an exercise. Such advice and mandates had been duly procured and approved when exercising that discretion under s 60(3) of the Companies Act 1965 ('the Act'). The defendant had also engaged an investment bank to provide advice on the structure and mechanism of the proposed corporate exercise. Bursa Malaysia had given its approval to the defendant on the listing of the rights issue, bonus shares, warrants, and the new Toyo Shares to be issued pursuant to the exercise of the warrants and allowed the defendant to issue the relevant circular to its shareholders (see paras 37–42).

(2) The underpinning principle on amendments is that a company may always alter or amend any of its articles. Such amendment to the company's articles is however subject to the Act and to the conditions in the memorandum. This is provided under s 31 of the Act (see para 47).

(3) This was an exercise to raise capital for the defendant to meet the defendant's funding requirements and, to settle outstanding banking facilities. Such objectives surely could only work in the best interest of the defendant, which was paramount; and indirectly the plaintiffs as shareholders of the defendant. While the articles of a company cannot be altered such as to infringe on minority rights, the competing interests of the majority and the company as a whole must always be considered (see paras 50 & 58).

(4) Since the whole rationale behind the corporate exercise was not in bad faith, the court could not see why the articles could not be amended as proposed. The exercise was in the view of the Board in the best interests of the defendant. That view was implicitly supported by Bursa when it approved the proposal before it was circulated to the shareholders. Moreover, the resolutions have been passed, approved and adopted by the majority of the shareholders at the EGM. The views and decisions of that majority must not be ignored and should never be allowed to be overtaken by the views of the minorities who have no real basis to

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challenge. Therefore, the amendment of article 130 was proper and in accord with the governing principles (see paras 61–62).

(5) There was no creation of two or different classes of shareholders. The plaintiffs were offered the same rights as the other shareholders in relation to the rights shares. As an added incentive, bonus shares would be issued to those who took up the rights shares (see para 64).

[Bahasa Malaysia summary

Tiga resolusi biasa dan satu resolusi khas telah diluluskan semasa mesyuarat agung luar biasa ('EGM') defendan. Tiga resolusi tersebut telah diatur oleh langkah korporat yang dijalankan oleh defendan. Resolusi pertama adalah bagi pengeluaran isu hak-hak boleh lepas syer-syer biasa yang baharu; resolusi kedua adalah bagi pengeluaran isu bonus berasaskan satu syer baharu bagi dua saham hak yang diambil oleh pemegang-pemegang syer sedia ada; resolusi ketiga adalah bagi peningkatan modal syer yang dibenarkan oleh defendan; dan resolusi keempat adalah bagi pindaan kepada memorandum dan tataurusan persatuan ('M&A') defendan sebagai hasil kepada saham hak yang dicadangkan, isu bonus yang dicadangkan dan peningkatan dalam modal syer yang dibenarkan. Plaintif-plaintif merupakan pemegang-pemegang syer minoriti defendan. Plaintif-plaintif mencabar resolusi kedua dan keempat, mendakwa bahawa resolusi-resolusi ini adalah tidak sah dan batal serta *ultra vires* M&A defendan. Plaintif-plaintif menghujahkan bahawa artikel 130 M&A defendan yang asal tidak membenarkan langkah korporat yang digambarkan di bawah resolusi kedua agar dijalankan. Plaintif-plaintif seterusnya mendakwa bahawa resolusi-resolusi membentuk dua kelas pemegang-pemegang syer yang berbeza dengan memberi syer bonus hanya kepada kumpulan pemegang-pemegang syer biasa yang tertentu, iaitu kumpulan pemegang-pemegang syer yang mengambil saham hak. Defendan menghujahkan bahawa rasional komersil sebalik keseluruhan langkah korporat adalah untuk meningkatkan modal kerja untuk defendan. Hasil daripada ambilan tersebut selanjutnya dijangka akan mengurangkan atau merendahkan pinjaman bank defendan. Ini dikatakan faedah-faedah *bona fide* defendan.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos sebanyak RM80,000:

(1) Berkenaan kebenaran untuk memanfaatkan jumlah dalam akaun simpanan dan premium, Lembaga Pengarah defendan diperuntukkan dengan kuasa yang perlu untuk membuat cadangan sedemikian kepada EGM. Defendan, sebagai syarikat yang disenaraikan dalam Lembaga Utama Bursa Malaysia Securities Bhd ('Bursa') juga berkewajipan untuk mematuhi keperluan undang-undang Bursa yang ketat sebelum menjalankan langkah sedemikian. Nasihat dan mandat sedemikian diperolehi dan diluluskan secara wajar dalam menjalankan kuasa budi

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bicara di bawah s 60(3) Akta Syarikat 1965 ('Akta'). Defendan juga menggunakan khidmat bank pelaburan untuk memperuntukkan nasihat bagi memberi nasihat mengenai struktur dan mekanisme bagi langkah korporat yang dicadangkan. Bursa Malaysia telah memberikan kebenaran kepada defendan mengenai senarai saham hak, syer bonus, waran dan syer Toyo yang baru yang perlu dikeluarkan di bawah langkah waran dan membenarkan defendan mengeluarkan pekeliling kepada pemegang-pemegang syernya (lihat perenggan 37–42).

(2) Prinsip yang menyokong pindaan adalah bahawa sesebuah syarikat boleh mengubah atau meminda mana-mana artikelnya. Pindaan sedemikian kepada artikel syarikat adalah, walau bagaimanapun, tertakluk pada Akta dan syarat-syarat memorandum. Ini diperuntukkan di bawah s 31 Akta (lihat perenggan 47).

(3) Ini adalah langkah untuk meningkatkan modal agar defendan memenuhi syarat-syarat pembiayaan defendan dan, untuk menyelesaikan fasiliti perbankan yang terhutang. Objektif sedemikian sememangnya berfungsi dalam kepentingan utama defendan, yang mana adalah paling utama; dan secara tidak langsung, plaintif, sebagai pemegang-pemegang syer defendan. Walaupun artikel-artikel sesebuah syarikat tidak boleh diubah hingga melanggar hak-hak minoriti, persaingan kepentingan majoriti dan syarikat secara keseluruhannya mestilah sentiasa diseimbangi (lihat perenggan 50 & 58).

(4) Oleh kerana rasional di sebalik langkah korporat tidak berniat jahat, mahkamah tidak melihat mengapa artikel tidak boleh dipinda seperti yang dicadangkan. Langkah tersebut adalah berdasarkan pandangan lembaga, dalam kepentingan defendan. Pandangan tersebut secara tersirat disokong oleh Bursa apabila ia meluluskan cadangan tersebut sebelum disebarkan kepada pemegang-pemegang syer. Tambahan lagi, resolusi-resolusi telah dibenarkan, diluluskan dan diguna pakai oleh majoriti pemegang syer dalam EGM. Pandangan-pandangan dan keputusan majoriti tidak boleh dipedulikan and tidak boleh dibenarkan untuk mengatasi pandangan minoriti yang tidak mempunyai asas untuk mencabar. Oleh itu, pindaan kepada artikel 130 adalah betul dan selaras dengan prinsip-prinsip yang mengawal (lihat perenggan 61–62).

(5) Tiada pembentukan dua atau kelas pemegang syer yang berbeza. Plaintif-plaintif ditawarkan hak-hak yang sama seperti pemegang-pemegang syer yang lain berkenaan hak-hak syer. Sebagai insentif tambahan, syer-syer bonus akan dikeluarkan kepada mereka yang mengambil hak-hak syer (lihat perenggan 64).]

Notes

For cases on issues of shares, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1006–1011.

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Cases referred to

A Company, Re [1986] BCLC 362, Ch D (refd)
A Company (No 005134 of 1986), ex parte Harries, Re [1989] BCLC 383, Ch D (refd)
Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656, CA (refd)
Brown v British Abrasive Wheel Co Ltd [1919] 1 Ch 290, Ch D (refd)
BSB Holdings Ltd (No 2), Re [1996] 1 BCLC 155, Ch D (refd)
BTR Nylex Ltd v Churchill International Inc (1992) 9 ASCR 361, SC (refd)
Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd [1920] 2 Ch 124, Ch D (refd)
Mutual Life Insurance Company of New York and others v The Rank Organisation Ltd and others [1985] BCLC 11, Ch D (refd)
Pang Ten Fatt & Anor v Tawau Transport Co Sdn Bhd & Ors [1986] 1 MLJ 179 (refd)
Peters' American Delicacy Company Ltd v Heath & Others (1938–1939]) 61 CLR 457, HC (folld)
Sidebottom v Kershaw Leese & Co Ltd [1920] 1 Ch 154, CA (refd)
Tong Kok Chai v Ocean Front Pte Ltd & Anor [1988] 3 MLJ 125, HC (refd)

Legislation referred to

Banking Act (Cap 19) [SG]
Companies Act 1948 s 20
Companies Act 1965 ss 31, 60, 60(2), (3)(a), (b), (c), (d), (e), (f), 65, 181, 181A

Richard Tee (Grace HY Chin and TK Wong with him) (Richard Tee & Chin) for the plaintiff.
Ranjit Singh (Kelvin Seet Wan Nam and Vendee Chai with him) (Ranjit Singh & Yeoh) for the defendant.

Mary Lim J:

THE CHALLENGE

[1] On 3 December 2012, three ordinary resolutions and one special resolution were passed at the extraordinary general meeting of the defendant. Of those resolutions, two are under challenge in these proceedings. These resolutions were occasioned by a corporate exercise undertaken by the defendant on 10 August 2012. The regularity of the EGM which voted on the four resolutions is not in question.

[2] These were the four resolutions:

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ORDINARY RESOLUTION 1

Proposed renounceable rights issue of up to 42,800,000 new ordinary shares of RM1.00 each in TIGB ('Rights Shares') together with up to 42,800,000 free new detachable warrants ('Warrants') at an issue price of RM1.20 per rights share on the basis of one (1) rights share together with one (1) free warrant for every one (1) existing ordinary share of RM1.00 each held in TIGB ('TIGB Share' or 'Share') at an entitlement date to be determined and announced later ('Proposed Rights Issue With Warrants')

ORDINARY RESOLUTION 2

Proposed bonus issue of up to 21,400,000 TIGB shares ('Bonus Share') to be credited as fully paid-up on the basis of one (1) new TIGB share for every two (2) rights share subscribed by the existing shareholders of TIGB and/or their renouncee(s) pursuant to the Proposed Rights Issue with Warrants ('Proposed Bonus Issue')

ORDINARY RESOLUTION 3

Proposed increase in the authorised share capital of TIGB from RM50,000,000 comprising 50,000,000 TIGB shares to RM250,000,000 comprising 250,000,000 TIGB share ('Proposed Increase in the Authorised Share Capital')

SPECIAL RESOLUTION 1

Proposed amendments to the company's memorandum and articles of association as a consequence of the Proposed Rights Issue with Warrants, Proposed Bonus Issue and Proposed Increase in the Authorised Share Capital ('Proposed M&A Amendment')

[3] In this originating summons, the plaintiffs have challenged only ordinary resolution 2 and the special resolution which were passed at the EGM despite their protests and objections. The plaintiffs claimed that these resolutions are null and void and are ultra vires the defendant's memorandum and articles of association.

[4] The plaintiffs are minority shareholders of the defendant. Between them, they own a total of 788,300 ordinary shares in the defendant. However, it must be made clear at the outset that the plaintiffs have not initiated the present proceedings either as a minority oppression petition under a s 181 of the Companies Act 1965; or as a derivative action under s 181A of the Companies Act 1965. The plaintiffs' action is personal to them as shareholders of the defendant for alleged violations of their rights under the articles of association.

[5] It is the plaintiffs' contention that the original article 130 of the defendant's memorandum and articles of association did not allow the corporate exercise envisaged under ordinary resolution 2 to be carried out.

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Because of this, the special resolution was then passed. Since this resolution was passed subsequent to the other resolutions, especially ordinary resolution 2, the plaintiffs argue that this amended article 130 cannot cure the contravention incurred by ordinary resolution 2 because it does not have retrospective effect in law. In this regard, article 40 of the M&A of the defendant was also said to have been violated.

[6] The plaintiffs say that while a company may always alter its memorandum and articles of association by special resolution, the company is still subjected to the provisions of the Companies Act 1965; and that all such amendments must be bona fides done in the interests of the company as a whole. The plaintiffs maintain that these fundamental principles of company law, in particular s 65 of the Companies Act 1965 which require all ordinary shares to be treated equally; have been violated.

[7] According to the plaintiffs, the resolutions created what the plaintiffs say are two different classes of ordinary shareholders by giving bonus shares to only a particular group of ordinary shareholders. That group is the group of shareholders who subscribe to the rights issues. The plaintiffs say they will face financial difficulties in raising around RM945,960 in order to take up those bonus shares. Such exercise therefore cannot be said to be in the bona fides interests of the defendant as a whole. Consequently, ordinary resolution 2 and the special resolution are null and void.

THE RESPONSES

[8] The defendant explained the circumstances and the commercial rationale behind the whole corporate exercise. Given that the plaintiffs do not challenge ordinary resolutions 1 and 3, the defendant submitted that all four resolutions must be considered as a whole and a part of that corporate exercise.

[9] As advised in the circular to all shareholders at the EGM, the board of directors of the defendant had decided that proposed rights issue with warrants was to raise working capital for the defendant. The proceeds from the subscription were further expected to reduce or pare down the defendant's bank borrowings. The board of directors believed that the exercise was in the bona fides interests of the defendant.

[10] The bona fides of the exercise is not in dispute and there is nothing to suggest nor are the plaintiffs suggesting that the exercise is for a collateral purpose or ulterior motive. With this, the defendant say that if the plaintiffs have accepted that and have not challenged the other two ordinary resolutions, it simply did not stand to reason their present challenge.

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[11] The defendant next dealt with the plaintiffs' complaint of unfairness; that they will face financial difficulties in subscribing for the rights share; or because they may not be interested in subscribing. To this, the defendant argue that with the defendant being a public listed company, then the plaintiffs' best option was to sell their shares.

[12] As for the allegation that there was inequality and the creation of two different classes of ordinary shareholders, this was denied by the defendant who went on to explain that all shareholders were in fact given the same entitlement to the rights shares which are provisionally allotted to them under ordinary resolution 1. The bonus shares were issued as an incentive to the shareholders who subscribe to the rights issue. The shareholders who do not wish to subscribe to the rights issue were allowed to renounce their rights. Ultimately, it was the interests of the defendant which should prevail over any individual interest.

FINDINGS

[13] The parties have agreed that the case only concerns questions of law and there is no dispute on the facts. Since there are no disputes on facts as found in the affidavits filed by both parties, the parties agreed that the case be disposed by way of submissions only.

[14] These are the main reliefs sought by the plaintiffs in the amended originating summons:

(a) declaration that ordinary resolution 2 and the special resolution which were passed by Toyo Ink Group Bhd at the extraordinary general meeting on 3 December 2012 are null and void;

(b) declaration that ordinary resolution 2 which was passed by Toyo Ink Group Bhd at the extraordinary general meeting on 3 December 2012 was ultra vires of Toyo Ink Group Bhd's memorandum and articles of association and not valid/of no effect;

(c) an order that all ordinary shareholders of Toyo Ink Group Bhd be treated equally in proportion to their shareholding and that all the ordinary shareholders be entitled to bonus shares in proportion to their shareholding without any restrictions attached;

(d) indemnities and/or compensation to be calculated based on the share price of Toyo Ink Group Bhd at the highest price and/or at RM1.80 per share.

[15] Over and above declaratory orders, the plaintiffs are also looking for compensation calculated by reference to the value of the share which the

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plaintiffs have pegged at RM1.80 per share. This additional relief was granted vide amendments to the originating summons which were not objected to by the defendant.

[16] It is important to start with the circular issued to the shareholders of the defendant as it houses the details of the corporate exercise, rationale for the exercise, and the mandates sought from the shareholders. In that circular, four proposals were submitted for the shareholders' consideration; namely proposed rights issue with warrants, proposed bonus issue, proposed increase in authorised share capital, and proposed M&A amendment. Details of the four proposals were set out at para 2.

[17] In relation to the proposed rights issue with warrants, it was explained that it entailed an issuance of up to 42,800,000 rights shares at an issue price of RM1.20 per rights share on an renounceable basis of one rights share for every one existing TIGB share held together with up to 42,800,000 warrants on the basis of one warrant for every one rights share subscribed for by the entitled shareholders. Based on the issued and paid up capital share capital of the defendant of 42,800,000 shares, a total of 42,800,000 rights shares together with the same number of warrants would be issued in the event all the entitled shareholders fully subscribed for their entitlements.

[18] If there was a renunciation of the rights shares by the entitled shareholders, accordingly the warrants would be renounced. If there was partial acceptance, then the warrants would be proportionately issued. Further, the renunciation of the rights shares would 'simultaneously and correspondingly entail the renunciation of the Bonus Shares to be issued pursuant to the Proposed Bonus Issue'. Fractional entitlements were disregarded and would be dealt with by the defendant's board of directors who 'shall in their absolute discretion deem expedient or to be in the best interests of the company'. The justification for the issue price of both the rights shares and the warrants were further set out at paras 2.1.1 and 2.1.2.

[19] At para 2.2, details of the proposed bonus issue were given. A total of 21,400,000 bonus shares will be issued. These bonus shares will be issued only to the entitled shareholders who subscribe to the rights shares pursuant to the proposed rights issue with warrants. Accordingly, the shareholders of the defendant who renounce their entitlements to the rights shares which have been provisionally allotted to them under the proposed rights issue with warrants will 'simultaneously relinquish their entitlements to the Bonus Shares'. There is provision for fractional entitlements – it is to be dealt with at the board of directors' 'absolute discretion' according to the 'best interest of the company'.

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[20] Next, the details of the capitalisation of the proposed bonus shares can be found at para 2.2.1. There, it is indicated that these shares will be raised from the share premium and the retained profits of the defendant. Two scenarios were offered; the minimum and the maximum depending on whether all shareholders take up the proposed rights issue with warrants. In both scenarios, a reminder to comply with para 6.30(1) of the listing requirements was made; that is, there must be ensured that the necessary reserves required for capitalisation of the bonus issue is unimpaired by losses on a consolidated basis.

[21] The position of the defendant's reserves was also addressed. The defendant's latest audited consolidated financial statements had been examined by its external auditors who confirmed that the defendant had adequate reserves available for the exercise. Even the unaudited quarterly report available for that period was not spared. It too, was said to be unimpaired by the exercise.

[22] At paras 2.3 and 2.4, details of the proposed increase in the authorised share capital and the proposed M&A amendment were set out. At para 3, the rationale and benefits for the four proposals can be found. A separate explanation is made for each of the proposal:

> RATIONALE AND BENEFITS FOR THE PROPOSALS
>
> 3.1 Proposed Rights Issue with Warrants
>
> After due consideration of the various funding options available to the Company, the Board is of the opinion that the Proposed Rights Issue with Warrants is the most appropriate avenue of fund raising for TIGB after taking into consideration several major factors including the following:
>
> (i) the Proposed Rights Issue with Warrants will provide the shareholders of TIGB with an opportunity to further increase their equity participation in the Company via the issuance of new TIGB Shares without diluting the existing shareholders' interest, assuming that all Entitled Shareholders fully subscribe for their respective entitlements pursuant to the Proposed Rights Issue with Warrants;
>
> (ii) the Proposed Rights Issue with Warrants will improve liquidity and financial flexibility, as well as to optimise the TIGB Group's capital structure by strengthening the statement of financial position and reducing its current gearing level;
>
> (iii) the Warrants to be issued pursuant to the Proposed Rights Issue with Warrants will provide the shareholders of TIGB with an incentive to subscribe for the Rights Shares. The Entitled Shareholders may also benefit from the potential capital appreciation of the Warrants. The Warrants will allow the Entitled Shareholders to increase their equity participation in the Company at a predetermined price over the tenure of the Warrants. In addition, the Company would also be able to raise further proceeds as and when any of the Warrants are exercised; and

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(iv) proceeds raised from the Proposed Rights Issue with Warrants is expected to be sufficient to repay a substantial amount of the TIGB Group's outstanding bank borrowings under the Minimum Scenario and sufficient to repay all of the TIGB Group's outstanding bank borrowings and to finance the working capital of the TIGB Group under the Maximum Scenario. It is the Company's intention to gradually reduce its reliance on the bank borrowings. As illustrated in Section 2.1.5, the repayment of bank borrowings amounting to between RM23.83 million and RM28.66 million is expected to result in interest savings of approximately RM1.54 million to RM1.81 million per annum which would gradually reduce TIGB's reliance on bank borrowings thus reducing the gearing level of the TIGB Group, interest costs and finance costs. Based on the above, the Proposed Rights Issue with Warrants is sufficient to ensure adequate financial needs for the core business of the TIGB Group's future operations.

Proposed Bonus Issue

The Proposed Bonus Issue will:

(i) provide the Entitled Shareholders with an incentive to subscribe for the Rights Shares;

(ii) increase the Company's issued and paid-up share capital to a level which would be more reflective of its current scale of operations and assets employed; and

(iii) be able to encourage the trading liquidity of TIGB Shares on Bursa Securities through greater participation by investors.

3.3 Proposed Increase in Authorised Share Capital

The Proposed Increase in the Authorised Share Capital is to accommodate the issuance of the Rights Shares, Bonus Shares and any future issuance of new TIGB Shares arising from the exercise of the Warrants.

3.4 Proposed M&A Amendment

The Proposed M&A Amendment is undertaken to facilitate and to reflect the consequence of the Proposed Rights Issue With Warrants, Proposed Bonus Issue and Proposed Increase in the Authorised Share Capital.

[23] This sets the necessary background of the corporate exercise and tells exactly was happening in the defendant at the material time. It is quite apparent that each proposal is carefully explained together with figures and financial data to support. Consequences and implications of adopting the proposals are not left out.

[24] Bearing in mind that the plaintiffs' action is personal, that there are infringements of their rights qua shareholders, the first question to ask is what those rights as ordinary shareholders are. As I understand the plaintiffs' case, their complaint is that they will not to get to enjoy the fruits of their investment

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in the defendant. This perceived loss of enjoyment stems from their understanding of how a bonus share evolves.

[25] To start with, the term 'bonus share' is not defined under the Companies Act 1965. Some assistance however, can be gleaned from case authorities on the nature and characteristics of 'bonus shares'. One of the essential characteristic of bonus shares is that it is paid for not by the shareholder but by the capitalisation of an amount standing to the credit of one of the company's account or reserves. This was observed by the Supreme Court of Victoria in the case of *BTR Nylex Ltd v Churchill International Inc* (1992) 9 ASCR 361 at p 369.

[26] In that case, Churchill was the holder of a convertible note issued by BTR Nylex wherein the issuer promised to pay to the order of the holder of the note the principal sum of USD52,500,00 on 6 July 1994 (with interest). It became holder on 2 March 1990. As noteholder, it had the option to convert the note into fully paid ordinary shares at any time during the last four years of its term at a stipulate conversion price with adjustments in certain events. At the time of the issue of the note, BTR Nylex's share capital was divided into 2 billion ordinary shares of $0.50 each.

[27] In December 1988, BTR Nylex had amended its articles of association so as to empower the company in general meeting to authorise its directors to establish a share investment plan. On 28 November 1989, the board of directors of Nylex resolved that shareholders in the company be offered the opportunity to participate in this share investment plan in lieu of receiving final dividend for the year ended 31 December 1989. On 13 March 1990, the board resolved that a final dividend for the year ending 31 December 1989 be declared on all fully paid shares of the company which were not participating shares in the share investment plan, payable on 18 May 1990.

[28] The note itself was divided into '12 sections' of which s 1 dealt with conversions. Under this section, BTR Nylex's distribution of securities, dividend, bonus distribution in shares, subdivision of shares and the like, were treated as 'derivative property'.

[29] On 8 June 1990, Churchill gave notice exercising its option to convert. After Churchill had exercised its option, a dispute arose as to what constituted 'derivative property' within the meaning of this provision. Churchill asserted while the company denied that shares issued in lieu of the interim and final dividends were derivative property. If indeed Churchill's assertion was correct, then it would be entitled to receive the one-on-one bonus on its holding as enlarged by the issue of shares in lieu of the interim dividend. It was however, a common ground that the shares issued in lieu of final dividend were not

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entitled to receive this accretion in view of a directors' resolution to that effect. It was in this context that the court discussed the attributes of 'bonus shares'.

[30] Specifically, Brooking J described 'bonus shares' in the following terms:

> The expression 'bonus shares' may be used of shares which are wrongly issued as fully paid, with the intention of making a gift of them, the allottees not having paid for them and the necessary capital not having been provided by the alternative means of the capitalisation of profits. This is the sense in which Wright J described shares as bonus shares in *Re Eddystone Marine Insurance Company* (1893) 3 Ch 9 at 13; in these circumstances the allottees are of course liable for the nominal amount of the shares they have take. But the usual meaning of 'bonus shares', the sense in which the expression has come to be habitually used by lawyers and businessmen alike, is shares which have been issued by means of the capitalisation of profits in order to pay them up, the amount paid by the company out of the profits being the bonus and the shares being called bonus shares, since the profits of the company are applied in paying up on behalf of the shareholders the capital sums which they would otherwise have to contribute. There is no accretion to the assets of the company and the assets side of its balance sheet is in consequence not affected; all that happens is that on the liabilities side sums are transferred from profit and loss or reserve account or one of the quasi-capital funds to share capital account or (if the shares are issued at a premium) to share capital account and share premium account. Bonus shares in this sense are not a gift; they are merely a distribution of capitalised undivided profit

[31] As will be seen, this general description accords with the provisions of s 60 of the Companies Act 1965 which deals with the issue of shares at a premium. Subsections 60(2) and (3) of the Companies Act 1965 read as follow:

> (2) Where a company issues shares for which a premium is received by the company whether in cash or in the form of other valuable consideration, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account called the 'share premium account' and the provisions of this Act relating to the reduction of the share capital of a company shall subject to this section apply as if the share premium account were paid up share capital of the company.
>
> (3) The share premium account may be applied:
>
> (a) in paying up unissued shares to be issued to members of the company as fully paid bonus shares;
>
> (b) in paying up in whole or in part the balance unpaid on shares previously issued to members of the company;
>
> (c) in the payment of dividends if such dividends are satisfied by the issue of shares to members of the company;
>
> (d) in the case of a company which carries on insurance business in Malaysia, by appropriation or transfer to any statutory fund established and maintained pursuant to any law of Malaysia relating to insurance;

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(e) in writing off:

(i) the preliminary expenses of the company; or

(ii) the expenses of, or the commission or brokerage paid or discount allowed on, any duty, fee or tax payable on or in connection with, any issue of shares of the company; or

(f) in providing for the premium payable on redemption of redeemable preference shares.

[32] In the distribution of profits or dividends, shareholders may sometimes be offered an election to take the dividends in the form of bonus shares instead of cash (as was the case in *BTR Nylex*). The issue of bonus shares emanates from the capitalisation of profits. These profits sit in one of the accounts or reserves of the company and sub-ss 60(2) and (3) envisage the issue of bonus shares from these accounts. In other words, the source of the capital for the bonus distribution in the shares is the company's own resources and not from the shareholders.

[33] In the case of the defendant, the share premium account is known as the shareholders fund. It is made up of paid up capital and reserves. The issue of bonus shares allows the transfer of funds from the reserves to the paid up capital portion in that fund.

[34] Whether or not the sums in the share premium account would be applied for the issue of shares is a matter of discretion. This can be reasonably concluded from a reading of sub-ss 60(2) and (3) which provide that the sums in the share premium account may be applied for the purposes found from (a) to (f).

[35] Furthermore, it does not appear from the terms of sub-ss 60(2) and (3) that a company which is capitalising its share premium account for bonus issue must, at the same time, allot the bonus shares to all existing shareholders. As opined by Brooking J in *BTR Nylex Ltd* (p 372):

> As a matter of company law there is no inexorable rule that bonus shares must be allotted to all existing shareholders or to all existing shareholders who would be entitled to receive a dividend, although the practice of making such a provision in the articles is inveterate, and the same result would follow in the unlikely event of the absence of express provision in the article providing for the capitalisation of profits. There is no reason, however, why any article permitting the capitalisation of profits could not make some different provision, as is done in the case of articles dealing with bonus share plans.

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[36] Therefore, when and how the funds in this shareholders fund are to be used is a matter of discretion. Consequently, the plaintiffs do not have any right to insist that bonus shares be issued to them. That discretion surely rests with the board of directors who, as a matter of sound practice and good corporate governance, would have obtained the appropriate proper, if not professional advice as well as the necessary mandates from the shareholders in order to act within the dictates of sub-s 60(3).

[37] The mandates to capitalise such sums is further provided for in article 130 of the defendant's memorandum and articles of association which, prior to its amendment read as follow:

> The Company in general meeting, may upon the recommendation of the Directors, resolve that it desirable to capitalise any sum standing to the credit of any of the Company's reserve accounts (including share premium account, and capital redemption reserve fund) or any sum standing to the credit of the profit and loss account and accordingly that the Directors be authorised and directed to appropriate such sum resolves to be capitalised to the members who would have been entitled thereto if distributed by way of dividend, and in the same proportions, and to apply such sum on their behalf, either in or towards paying up the amounts, if any, for the time being unpaid on any shares held by such members respectively, or in paying up in full unissued shares or debentures of the Company of a nominal amount equal to such sum, such shares or debentures to be allotted and distributed, credited as fully paid up, to and amongst such members in the proportion aforesaid, or partly in one way or partly in the other, PROVIDED that the only purpose to which such sums standing to capital redemption reserve or share premium account shall be applied pursuant to this article shall be the payment up in full of unissued shares to be allotted an distributed as aforesaid.

[38] The plaintiffs have argued that this article 130 did not allow the present corporate exercise to be carried out. It was in that vein that the case was made that resolution 2 was null and void. I shall deal with this aspect later.

[39] But, coming back to the issue of authority to capitalise sums in the reserves and premium account, as already pointed out, it is quite apparent that the board of directors of the defendant is vested with the necessary powers to make such recommendations to the EGM.

[40] Quite apart from this, the defendant, as a company listed on the main board of Bursa Malaysia Securities Bhd ('Bursa') was obliged to comply with the stringent legal requirements of Bursa before affecting such an exercise. In the facts of this case, it is not in dispute that such advice and mandates have been duly procured and approved when exercising that discretion under sub-ss 60(3). The exchange of correspondence with Bursa and the manner in which the exercise was carried out is quite clearly one dictated by the strictures of Bursa.

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[41] The evidence also shows that the defendant had engaged an investment bank to provide advice on the structure and mechanism of the proposed corporate exercise. Thereafter, the proposal was presented to Bursa Malaysia for approval.

[42] By letter dated 31 October 2012, Bursa Malaysia indeed informed the financial advisers of the defendant that the proposal had been approved on conditions. Bursa has given its approval to the defendant on the listing of the rights issue, bonus shares, warrants, and the new Toyo shares to be issued pursuant to the exercise of the warrants and allowed the defendant to issue the circular to its shareholders.

[43] Nowhere is there any indication or even suggestion that Bursa's approval was only on one and not all the proposals; and that included the issue of bonus shares and the amendments to the articles of the defendant. This is material and relevant as the proposals or the corporate exercise has passed muster of the regulatory body charged with scrutinising such affairs at the most fundamental levels. This critical fact cannot be ignored; let alone given scant respect.

[44] Further, as already pointed out at the outset, there is no question of the EGM being improperly convened or that the shareholders, including the plaintiffs not being given an opportunity to voice their concerns. On the contrary, the evidence in the form of well-documented and comprehensive minutes taken at that EGM (annexure I to the minutes), reveal all 33 queries from the third plaintiff were meticulously responded to by the investment bank as advisor to the defendant's proposal. In fact, those 33 queries are substantially the same concerns presented in this originating summons.

[45] As explained in the circular to all shareholders, and reiterated by the representative of the investment bank at the EGM, all existing shareholders were entitled to subscribe to the rights shares which had had been provisionally allotted to them under the proposed rights issue with warrants. From the explanations provided, this provisional allotment was made by the board in the 'hope for all shareholders to participate in the proposed rights issue with warrants'. In the event the shareholders subscribe to the rights shares, then these shareholders will be issued with the bonus shares as an incentive.

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[46] It is in this latter aspect that the plaintiffs allege that two classes of shareholders with different rights would be created. Here, I shall deal with the amendment of article 130. This article was amended by way of the special resolution, resolution 4. The amended article, with the amendments marked, reads as follow:

> *Subject to the Act and applicable laws, the* Company in general meeting, may upon the recommendation of the Directors, resolve that it desirable to capitalise any sum standing to the credit of any of the Company's reserve accounts (including share premium account, and capital redemption reserve fund) or any sum standing to the credit of the profit and loss account and accordingly that the Directors be authorised and directed to appropriate such sum resolves to be capitalised to (i) the members who would have been entitled thereto if distributed by way of dividend, and in the same proportions, and to apply such sum on their behalf, either in or towards paying up the amounts, if any, for the time being unpaid on any shares held by such members respectively, or in paying up in full unissued shares or debentures of the Company of a nominal amount equal to such sum, such shares or debentures to be allotted and distributed, credited as fully paid up, to and amongst such members in the proportion aforesaid, or partly in one way or partly in the other *OR (ii) to Qualifying Members only in proportion to which these Qualifying Members are entitled pursuant to a resolution of the Company to that effect and for the purposes of this article, 'Qualifying Members' refers to (a) members, who pursuant to a renounceable rights issue by the Company, have subscribed for the shares in the Company, and (b) in the case of renonucees who are non-members, those who have subscribed for the shares in the Company renounced to them, and (c) underwriters, who have been allotted with the said shares* PROVIDED that the only purpose to which such sums standing to capital redemption reserve or share premium account shall be applied pursuant to this article shall be the payment up in full of unissued shares to be allotted an distributed as aforesaid. (Emphasis added.)

[47] The underpinning principle on amendments is that a company may always alter or amend any of its articles. As observed by Latham CJ of the High Court of Australia in *Peters' American Delicacy Company Ltd v Heath & Others* (1938–1939) 61 CLR 457at p 479:

> A company cannot deprive itself of this statutory power either by agreement or by a provision contained in the articles It is not possible, by articles of association, to make an unalterable article.

[48] Such amendment to the company's articles is however subject to the Act and to the conditions in the memorandum. This is provided under s 31 of the Companies Act 1965 which provides:

(a) subject to this Act and to any conditions in its memorandum, a company may by special resolution alter or add to its articles; and

(b) any alteration or addition so made in the articles shall subject to this Act, on and from the date of special resolution or such later date as is specified

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in the resolution, be as valid as if originally contained therein and be subject in like manner to alteration by special resolution.

[49] The plaintiffs have cited two textbooks in further support of their case. The plaintiffs submitted that in both *Arjunan: Company Law in Malaysia (Lexis Nexis, 2006)* and Chan & Koh: *Malaysian Company Law Principles & Practice* Sweet & Maxwell, (2nd Ed), the authors considered similar cases when expressing the view that the articles cannot be altered in a manner which infringes on the rights of minorities. In *Chan & Koh on Malaysian Company Law Principles & Practice*, the authors opined that 'the fundamental issue whether the exercising of a power by majority shareholders to alter the articles to expropriate compulsorily the shares of the minority shareholders will be valid' had been considered in at least three English cases. The authors went on to discuss those cases, namely *Brown v British Abrasive Wheel Co Ltd* [1919] 1 Ch 290; *Sidebottom v Kershaw Leese & Co Ltd* [1920] 1 Ch 154; and *Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd* [1920] 2 Ch 124.

[50] Having examined those cases, I must express a note of caution. A distinction actually has to be drawn between the facts and circumstances in the present case from all cases discussed by the authors of *Malaysian Company Law Principles & Practice*. In the three English cases discussed, the courts there were concerned with the exercise of power by majority shareholders to alter the articles of association so as to expropriate compulsorily the shares of the minority. That is entirely different from the present case. Here, we are not dealing with any expropriation or anything of that nature. This is an exercise to raise capital for the defendant in order to meet the funding requirements of the defendant and, to settle outstanding banking facilities. Such objectives surely can only work in the best interest of the defendant, which is paramount; and indirectly the plaintiffs as shareholders of the defendant.

[51] As for the facts in *Pang Ten Fatt & Anor v Tawau Transport Co Sdn Bhd & Ors* [1986] 1 MLJ 179, they were peculiar. There, the amendment was to alter the rights and privileges of founding members and permanent directors. It was in that context that the court ruled that such amendments were null and void. Again, that is quite a different exercise from the instant case.

[52] The other decision discussed by both authors was the decision of the High Court of Singapore in *Tong Kok Chai v Ocean Front Pte Ltd & Anor* [1988] 3 MLJ 125. According to the authors, this case is authority for the proposition that amendments to the company's articles and memorandum must be done in good faith and in the interests of the company as a whole.

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[53] With respect, a careful reading of this decision will show that this was not the ratio decidendi in the case. There, the plaintiff was seeking an interlocutory injunction restraining the first defendant from altering one of the articles of association until the hearing or until further order. The plaintiff was a shareholder of the first defendant and he had deposited his shares with Ka Wah Bank Ltd, the second defendant as security for banking facilities that he was seeking from the bank.

[54] The bank commenced legal proceedings against the plaintiff to recover monies due under the facilities granted to the plaintiff. The plaintiff denied that any monies was due and alleged that the bank in any case had violated the Banking Act of Singapore in that it had conducted banking business in Singapore without a banking licence in which case the overdraft granted to the plaintiff was illegal, null and irrevocable. The plaintiff counterclaimed for the return of his shares.

[55] In separate proceedings initiated by the bank against the first defendant, the bank sought for an order that the register of the company be rectified so as to strike out the name of the plaintiff as owner of the shares that it had pledged with the bank; and in lieu thereof, to insert the bank's name as holder of the shares. The plaintiff was enjoined in those proceedings. Pending the disposal of the case, the bank sold the shares to 'a majority shareholder of the company'. The plaintiff was notified of the sale and he disputed the bank's right to sell his shares.

[56] Subsequently, the first defendant issued a notice of an EGM to be convened for the purpose of passing, inter alia, a special resolution to alter the articles of association. Those alterations included a deletion of the existing article 26 which would restrict the transfer of shares and confer on the members a right to pre-empt in the event of a transfer of shares to a person who is not a member of the company; and the substitution of new articles which in effect gave a member a right to transfer all or any of his shares to any person, except an infant, bankrupt or person of unsound mind. No explanation was offered by the company as to why the alterations were made and why it had to be made at that stage.

[57] It was in that context that Thean J observed that the question of whether the proposed alteration of article 26 of the articles of association was bona fide for the benefit of the company as a whole was a serious question to be tried.

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[58] Be that as it may, I would think that the bona fides of an act, especially one which seeks to alter the substratum of any arrangement, including a right, would require that it be done in good faith and in the best interests of the company. I would add that while the articles of a company cannot be altered such as to infringe on minority rights, the competing interests of the majority and the company as a whole must always be considered. Support for this can be found in *Peters' American Delicacy* where the High Court of Australia citing *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 said at p 480:

> The power to alter articles must be exercise bona fide. It is generally said that the power must be exercised bona fide for the benefit of the company as a whole, and all recent authorities refer to the statement by Lindley MR in *Allen*'s Case: 'The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s 50' 'is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed.'

[59] The court went on to cite *Allen*'s case where an article had been amended in such a way as to prejudice quite seriously a single person who was the only holder of fully paid up shares of the company. Despite that, the alteration was upheld as valid as it was bona fide made in order to enable the company to recover monies due to the company which surely must be for the benefit of the company.

[60] The burden of proof will lie with the plaintiffs. This was also expressed in *Peters' American Delicacy*, p 482 where Latham CJ wrote that:

> When the validity of a resolution of shareholders is challenged, the onus of showing that the power has not been properly exercised is on the party complaining. The court will not presume fraud or oppression of other abuse of power It cannot be the law that a resolution of shareholders is to be presumed to be invalid until the defendants in an action positively establish that it is valid.

[61] Having regard to my findings on the whole rationale behind the corporate exercise and given that there is no suggestion at all by the plaintiffs that the exercise is in bad faith, I cannot see how the articles cannot be amended as proposed. The exercise is in the view of the board in the best interests of the defendant. That view may be said to have been implicitly supported by Bursa when it approved the proposal before it was circulated to the shareholders. Most important and this fact should not be overlooked, the resolutions have been passed, approved and adopted by the majority of the shareholders at the

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EGM. The views and decisions of that majority must not be ignored and should never be allowed to be overtaken by the views of the minorities who have no real basis to challenge.

[62] In fact, in *Peters' American Delicacy,* p 480, Latham CJ had further opined that:

> The fact that an alteration prejudices or diminishes some of the rights of the shareholders is not in itself a ground for attacking the validity of an alteration Any other view would, in effect, make unalterable and permanent any articles of association which conferred rights upon a class of shareholders, or possibly upon any shareholder, if they or he desired that those rights should continue to exist unchanged. It is plainly not the law that the fact that an alteration of articles alters the rights or prejudices the rights of some shareholders is sufficient to prevent the alteration from being validly made.

[63] Therefore, the amendment of article 130 is proper and in accord with the governing principles.

[64] In any case, there is no creation of two or different classes of shareholders. The plaintiffs are offered the same rights as the other shareholders in relation to the rights shares. As an added incentive, bonus shares will be issued to those who take up the rights shares. This is apparent from the explanations of the defendant as found in the circular which explanation has been maintained in these proceedings.

[65] I agree with the defendant that it is somewhat peculiar if not inconsistent that the plaintiffs have on the one hand accepted resolutions 1 and 3 but on the other hand have challenged resolutions 2 and 4. It is quite obvious that all four resolutions have to be read together and are interdependent: resolution 2 is subject to the passing of resolutions 1, 3 and 4 whereas resolution 4 is subject to the passing resolutions 1, 2 and 3. Further, resolution 1 prescribes the creation of a rights issue with warrants and the proposed bonus issue relates to that rights issue. Once understood in that light it can be seen that the concerns of the plaintiffs are not founded.

[66] The plaintiffs cannot look at the bonus issue in isolation and make any valid complaint when they know full well that the whole corporate exercise is to raise working capital and repay outstanding banking facilities; and they do not dispute that. Such an objective is undeniably in the best interests of the defendant quite unlike the circumstances in the case of *Re a Company (No 005134 of 1986), ex parte Harries* [1989] BCLC 383.

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[67] In *Re a Company*, the second respondent who was the majority shareholder was secretly allotted shares which increased his shareholding and consequently reduced the shareholding of the petitioner, a minority shareholder. The court found that the increase of shareholding 'was commercially irrelevant to the needs of the company'; and that the second respondent knew that its effect would be to increase his and reduce the petitioner's holding. In remarking on the acts of the second respondent, Peter Gibson J said:

> I cannot conceive of a more blatant case of unfairly prejudicial conduct to a member than the unilateral and secret exercise by a director of the power of allotment so as to increase his own shareholding from 60% to 96% and to reduce the other member's holding thereby from 40% to 4%.

[68] Hoffman J in *Re a Company* [1986] BCLC 362, at p 367 had occasion to consider the complaint of lack of funds by shareholders to take up shares; and whether such a situation could be said to constitute unfair prejudicial conduct. His Lordship said :

> ... I do not think that the bona fides of the decision or the fact that the petitioner was offered shares on the same terms as other shareholders necessarily means that the rights issue could not have been unfairly prejudicial to his interests. If the majority know that the petitioner does not have the money to take up his rights and the offer is made at par when the shares are plainly worth a great deal more than par as part of a majority holding (but very little as a minority holding), it seems to me arguable that carrying through the transaction in that form could, viewed objectively, constitute unfairly prejudicial conduct. In this case however, it seems to me that the petitioner, if he lacks the resources or inclination to contribute pari passu to the company, could protect his interests by offering to sell his existing holding to the majority. Indeed, if the company needs funds and he does not want to pay his share, it seems to me only fair that he should offer to sell out.

[69] Although the challenge in that case was by an oppression petition, the views of the court are nevertheless instructive. Here, the plaintiffs do not allege that the majority of the shareholders knew of their financial predicament, if that was indeed the case. Hence, similarly, the plaintiffs here do have the option, particularly of a listed company, to 'sell out' their shares. It seems to be that that would be a fair option.

[70] The above views and principles are fairly consistent in the several jurisdictions that have been examined. In *Mutual Life Insurance Company of New York and others v The Rank Organisation Ltd and others* [1985] BCLC 11, the court opined :

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> To my mind the wide powers and provision contained in art 7, being themselves an express term of the membership contract which the members have accepted, ought not to be whittled down by any implication beyond what is required in the circumstances of the membership contract by the ordinary principles of the law of contract. That law in such circumstances, and so far as relevant to this action, required in my judgement but two implied terms. First, the time honoured rule that the directors' powers are to be exercised in good faith in the interest of the company, and secondly, that they must be exercised fairly as between different shareholders. I doubt whether it is possible to formulate either if the stipulations more precisely because of the infinity of circumstances in which they may fall to be applied.
>
> I turn to the remaining test which I have proposed, namely, that of fairness between different shareholders. It must be borne in mind that in my view the equality of individual shareholders in point of right, does not always require an identity of treatment.

[71] Insofar as the first term is concerned, I have extensively pointed out that the exercise was and is one done with utmost good faith and in the best interests of the company. It is one made with care and accountability.

[72] As for the second element of equal treatment in what is fundamentally a contractual relationship between the plaintiffs and the defendant company, 'the equality of individual shareholders in point of right, does not always require an identity of treatment'. In *Mutual Life Insurance Company of New York*, the numerous plaintiffs were beneficial owners of shares in The Rank Organisation which were registered in the name of a nominee company which in turn was the nominee of an American company. The rank offered for sale to the public 20million ordinary shares, half of which were made available on a preferential basis to existing rank A ordinary shareholders except those resident in the United States or in Canada, or their agents. These were excluded because of the securities regulations in their respective countries. The Rank's articles of association vested its directors with a power to allot deal with or dispose of the company's shares 'on such terms as they think proper'.

[73] The plaintiffs claimed that the offer was discriminating against them and that this was in breach of the contract of membership constituted under s 20 of the Companies Act 1948 which required rank to treat all members equally. That complaint is not unlike the present complaint of the plaintiffs that they have not been treated equally and that violates s 65 of the Companies Act 1965 which provides:

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> If in the case of a company the share capital of which is divided into different classes of shares provision is made by the memorandum or articles for authorising the variation or abrogation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the issued shares of that class or the sanction of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied or abrogated the holders of not less in the aggregate than ten per centum of the issued shares of that class, may apply to the Court to have the variation or abrogation cancelled, and, if any such application is made, the variation or abrogation shall not have effect until confirmed by the Court.

[74] In *Mutual Life Insurance*, Goulding J was of the opinion that 'the North American shareholders were fairly treated on occasion of the offer for sale, notwithstanding their exclusion from participation along with their compatriots who were not already shareholders'. His Lordship did was of the view that such exclusion did not affect the existence of the shares 'nor the rights attached to them'. The court also found that the difficulty faced by the plaintiffs was not one which rank could be faulted. In any case, should the capital be raised 'in the way which it was advised, and its directors believed, was most advantageous for the purposes of maintaining its investment programme, since the successful fulfilment of the programme would give a prospect of continuing benefit to all members whatever their personal situation', the court was not inclined to allow the plaintiffs' claims. In other words, the court found that the directors of rank had acted in the best interests of rank.

[75] As opined by Arden J in *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155, at p 249, and Her Ladyship had also discussed *Mutual Life Insurance*, it was 'implicit in the formulation of Goulding J that where the proposed act is required to be done in the interests of the company, the interests of the company prevail'. Similarly, since the corporate exercise is properly proposed, scrutinised and advised; implemented in the manner required by law and is bona fides believed by the defendant's board of directors to be in the best interests of the defendant; and which has the approval of the majority of shareholders at a regularly convened EGM; and which will ultimately benefit all shareholders including the plaintiffs; the interests of the defendant must prevail and the plaintiffs' claim accordingly must also fail.

[76] For all the reasons set out above, the plaintiffs have not discharged the burden of proof. Their case is accordingly dismissed with costs of RM80,000.

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Plaintiff's claim dismissed with costs of RM80,000.

Reported by Kanesh Sundrum